FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare,
Petitioner

VS

PEDRO PERALES,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF RESPONDENT

FRANK P. CHRISTIAN
HARRY B. ADAMS, III
FRED J. DEYESO
MELVIN N. EICHELBAUM
203 West Nueva Street
San Antonio, Texas 78207
Attorneys for the Bexar County Legal Aid Association

DAILY PRINTING CO. — 222-2345

INDEX

TABLE OF AUTHORITIES

Statutes:

Rules and Regulations:

Other:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 108

ELLIOT L. RICHARDSON, Secretary of Health, Education, and Welfare,
Petitioner

VS

PEDRO PERALES,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF RESPONDENT

INTEREST OF THE BEXAR COUNTY LEGAL AID ASSOCIATION

The Bexar County Legal Aid Association wishing to file an *amicus curiae* brief on behalf of Respondent in the case at bar has obtained the written consent of both Petitioner and Respondent to file an *amicus curiae* brief as required by Supreme Court Rule 42 (2), such written consents having been duly filed with the Clerk of this Court.

Copies of such written consents are set forth at pages 28 and 29 *infra*.

The Bexar County Legal Aid Association was established in 1952 as a non-profit organization to furnish legal services to those inhabitants of Bexar County, Texas, who cannot afford the services of private attorneys. The legal staff of the Association has training and practical experience in most areas of law of consequence to low income persons, including Social Security and public assistance law.

Attorneys on the staff of the Association presently represent clients in San Antonio, Texas, who have been denied benefits under the Social Security disability benefits program as well as clients who have been denied grants under the Federal-State Public Assistance programs administered by the Texas Department of Public Welfare. The procedures utilized at the administrative hearings provided in the two programs are essentially similar especially with regard to the use of uncorroborated, *ex parte* statements over timely objection by counsel, and the reliance upon such statements as being substantial evidence even in the face of direct, competent testimony which is contrary.

The very essence of the legal services program is to provide low income citizens with the ability to assert rights and challange practices which were previously beyond their financial means to assert and challange.

The Bexar County Legal Aid Association, on behalf of its clients situated similarly to Respondent in the instant case and on behalf of its other clients situated similarly in other administrative hearings before state and federal agencies, wishes to file this *amicus curiae* brief for the purpose of supporting Respondent's claim that uncorroborated, *ex parte* statements introduced over proper and timely objection in an administrative hearing leading to the adjudi-

cation of substantial rights under the Social Security disability law cannot, by themselves, amount to "substantial evidence" sufficient to support a determination, when such uncorroborated, *ex parte* statements have been contradicted by direct, competent testimony presented at such administrative hearing.

Issues and Relevance

The precise issue presented in the instant case is whether the court should sustain a finding of the Social Security Administration based solely on hearsay evidence which was admitted over timely objection and controverted by direct, competent testimony. This question, of course, has implications which go far beyond the particular claim of Pedro Perales, Respondent. Indeed, it is entirely possible that the Court's decision in this case will have a profound effect on the entire system of administrative procedure.

The Bexar County Legal Aid Association, as a nonprofit organization organized to provide legal services to the poor, feels that the issue presented in the instant case has great relevance for those who must look to governmental agencies for various types of assistance. Since many such individuals are numbered among the Association's clients, we are concerned as to the potential effect of the Court's decision, which might well apply to clients of the Association. Further, this decision will be determinative of the same issues in other United States courts, as well as the courts of the State of Texas.

Summary of Argument

The Bexar County Legal Aid Association will argue first that Social Security benefits are a valuable right, protected by Constitutional due process, and subject to deprivation only by an administrative adjudication based upon

substantial evidence conforming to the fundamental concepts of due process. The Association will further argue that the decision of the Court below is entirely in keeping with the fundamental principles applicable to all determinations by men which have evolved from centuries of experience, and to reverse this decision on the grounds urged by Petitioner would be an unwarranted and unprecedented departure from well established concepts. Finally, the Association will argue that uncorroborated, *ex parte* statements introduced over proper and timely objection in an administrative hearing leading to the adjudication of substantial rights under the Social Security disability law cannot, by themselves, amount to "substantial evidence" sufficient to support a determination, when such uncorroborated, *ex parte* statements have been contradicted by direct, competent testimony presented at such administrative hearing.

ARGUMENT

Point I

Social Security benefits are a valuable right, protected by constitutional due process, and subject to deprivation only by an administrative adjudication based upon substantial evidence conforming to the fundamental concepts of due process.

Amicus Curiae on behalf of Respondent contends that Social Security benefits are a valuable right. Generally, courts have not classified these benefits as a "property right" in the traditional sense because doing so "would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands." *Fleming v. Nestor*, 363 U. S. 603, 611 (1960). But regardless of the nature of the "right" to Social Security benefits, like public assistance benefits, few would deny that it is protected by

due process.[1] As Justice Brennan observed in *Goldberg v. Kelly*, ——————U.S.——————, 25 L. Ed. 2nd 287, n. 8 (March 23, 1970):

> It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property. It has been aptly noted that "[S]ociety is built around entitlement.... Many of the most important of these entitlements now flow from government:... **Social Security pensions for individuals...**" (emphasis added).

Although Social Security benefits might be properly classified as an "entitlement" rather than a "property right," certainly concepts of procedural due process apply as much to the deprivation of Social Security disability benefits as to a discharge from public employment; *Slochower v. Board of Education*, 350 U. S. 551 (1956); or to a disqualification to unemployment compensation; *Sherbert v. Verner*, 374 U.S. 398 (1963); or the right to obtain a retail liquor store license; *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); or to attend public school; *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. den. 368 U. S. 930 (1961); or to receive public assistance (welfare); *Goldberg v. Kelly, supra.* In almost every case where a government agency is expected to make adjudicatory decisions affecting the interests of citizens the safeguards of due process must be observed, and one of

---

[1] As to the right-privilege dichotomy in public assistant benefits, *see Welfare and Due Process — The Need for Change*, 1 St. Mary's Law J. 224, (1969); *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L. J. 1245 (1965); *The New Property*, 73 Yale L. J. 733 (1964).

the most fundamental of these safeguards is the right of confrontation and cross-examination. *Hannah v. Larch*, 363 U. S. 420 (1960). Indeed as one judge so aptly put it, the fundamental right of confrontation and cross-examination are the handmaidens of trustworthiness in the face of a factual dispute. *National Trailer Convoy, Inc. v. United States*, 293 F. Supp. 634 (D.C. Okla. 1968).

With regard to public assistance benefits, Justice Brennan in *Goldberg v. Kelly, supra* stated:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394, 58 L. Ed. 1363, 1369, 34 S. Ct. 779 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 552, 14 L. Ed. 2d 62, 66, 85 S. Ct. 1187 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Surely a claimant for Social Security disability benefits is entitled to at least the same protections as a recipient of public assistance. As the court below observed the claimant and his employer paid for his coverage under the Social Security law whether they wanted it or not. *See also Helvering v. Davis*, 301 U. S. 619 (1937).

> The "right" to Social Security benefits is in one sense "earned," for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years for protection from "the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end near." *Fleming v. Nestor, supra*

at 610.

Amicus Curiae on behalf of Respondent contended below and now contends that Congress specifically protected the fundamental rights of confrontation and cross-examination by enacting the Administrative Procedure Act. The Act provides:

> A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts ...5 U. S. C. A. 556 (d).

The court below rejected this contention and concluded that the right of confrontation and cross-examination provided for in the Administrative Procedure Act would not prevail over the procedures established by the Secretary of Health, Education and Welfare under the Social Security Act. However, *Amicus Curiae* on behalf of Respondent believes that this is contrary to the intentions of Congress and that the respective Acts are not in conflict. Nowhere in the Social Security Act or regulations thereunder is the right of confrontation and cross-examination specifically withheld from the claimant, and there is no reason to impute such an intention to the Secretary. Nevertheless, even if the two Acts are in conflict, the Administrative Procedure Act must control. *(See* Brief *Amicus Curiae* of the American Bar Association filed in the court below.)

Petitioner contends in his brief at page 35 that to allow claimants their right of confrontation and cross-examination would "...threaten to disrupt the administration of the entire program...." Even if there were any basis for such a bold assertion, it is settled law that administrative convenience or even necessity cannot override the Constitutional requirements of due process. *Ohio Bell Telephone*

Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 304 (1937); *United States v. Udy*, 381 F. 2d 455, 458 (10th Cir. 1967). Petitioner's undue concern about the "disruption of the entire program" is due to a misconception of the holding of the court below. Thus Petitioner on page 34 of his brief urges that under the holding below oral testimony of Social Security's reporting physicians would be required in large numbers of cases without any showing of need. The opinion of the court below makes it abundantly clear that only in certain limited circumstances would it be necessary for the agency to produce their reporting doctors as witnesses. Petitioner implies that the opinion of the court below requires the exclusion of all hearsay from consideration. This *Amicus Curiae* strongly disagrees and interprets the opinion of the court below as requiring the agency to bring forth as witnesses their reporting doctors only when the following elements concur: (1) The evidence adverse to the claimant is solely uncorroborated hearsay, (2) This uncorroborated hearsay has been duly and timely objected to, and (3) The claimant has made out a *prima facie* case for disability benefits by direct, competent testimony which contradicts the uncorroborated hearsay.

On pages 20 and 21 of his brief Petitioner states that by failing to request the subpoena of the reporting physicians, claimant is precluded from later complaining of the denial of his right to confrontation and cross-examination and also that his failure would tend to corroborate the "inherent probability" and "probative value" of the hearsay medical reports. This argument rests on the assumption that the claimant not only has the burden of proving his own case, but must additionally discredit the government's hearsay by subpoenaing the government's witnesses in order to show that they could not negate the claimant's direct, competent testimony. This assumption is falacious.

Once the claimant establishes a *prima facie* case for disability benefits by presenting direct, competent medical testimony which contradicts the government's hearsay medical reports, then the burden must shift to the government. If at this point, the hearing officer is still not convinced as to claimant's disability, he has the right, indeed the duty, to seek corroboration of the government's hearsay medical reports by subpoenaing the reporting doctors as witnesses. It is clear that the hearing officer can adjourn the hearing in order to procure additional evidence, and it is likewise clear he can issue subpoenas on his own initiative. *See* 20 C.F.R. 404.927 and 404.926. This shifting of burden is nothing new to the administration of the Social Security Act. The burden of proof as to disability is analogous to the burden of proof as to employability. Once the claimant has shown that he is disabled to the extent that he cannot do his former work, the burden then shifts to the government to show that the claimant could engage in some other kind of substantial gainful work. *Mullins v. Cohen,* 408 F. 2d 39 (6th Cir. 1969) ; *Smith v. Gardner,* 361 F. 2d 822 (6th Cir. 1966) ; *Gardner v. Brian,* 369 F.2d 443 (10th Cir. 1966). Surely it can not be said that claimant's fundamental right to confrontation and cross-examination has been abrogated because the claimant did not do that which it was incumbent upon the hearing officer to do. Nor can it be said that because the claimant failed to call the witnesses necessary to prove the government's side of the case, he should be penalized by an assumption that the government's uncorroborated hearsay becomes more credible.

Certainly, it is well established that an administrative decision that is not based on "substantial evidence" is of an arbitrary and unreasonable nature and thus would not satisfy the requisites of due process. The purpose of this

discussion, however, is to show that the issues involved here transcend mere technical definitions of "substantial evidence," and involve the very core of our concepts of due process. In every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *Greene v. McElroy*, 360 U. S. 474, 496-497 (1959); *I.C.C. v. Louisville & N.R. Co.*, 227 U. S. 88, 93-94 (1913); *Willner v. Commitee on Character*, 373 U. S. 96, 103-104 (1963). In the *Greene* case as Chief Justice Warren so succinctly put it:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is where governmental action seriously injuries an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue... We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment... This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases... but also in all types of cases where administrative... actions were under scrutiny.

But the Petitioner has not considered these questions in his brief. Rather, he attacks the decision of the court below on the narrow argument that uncorroborated hearsay is within the ambit of "substantial evidence." Therefore it would be fitting at this point to consider the nature of hearsay and examine the reasons for its traditional exclusion.

POINT II

The decision of the Court below is entirely in keeping with the fundamental principles applicable to all determina-

tions by men which have evolved from centuries of experience, and to reverse this decision on the grounds urged by petitioner would be an unwarranted and unprecedented departure from well established concepts.

The Hearsay Rule is a concept of the law of evidence which has been matured by the wisdom of ages, and revered from its antiquity and the good sense in which it was founded.

The Hearsay Rule is regarded by a leading commentator to be analytic in nature, establishing the basis for attacking hearsay evidence through means calculated to demonstrate the weakness of this evidence, and thereby affording a tribunal a standard for measuring its true value.[2] There appears to be no universal definition of the term "hearsay evidence" susceptible to a concrete application in all instances. Any definition of this term merely serves as a signpost along the path of analysis of the suspect evidence. Another authority carefully proposes the following definition of hearsay evidence:

> Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[3]

To understand the importance of the hearsay rule in the American system of jurisprudence, it becomes necessary to refresh the memory by a brief review of its historical development, and its impact upon the law of evidence as it is understood and applied in contemporary judicial proceedings.

---

[2] 5 Wigmore, *Evidence*, §1360
[3] McCormick, *Handbook of the Law of Evidence*, §225, p. 460

The innovation of the hearsay rule concept, as understood and applied today, is said to have been conceived in the early part of the Eighteenth Century.[4] Prior to this time, the hearsay rule may be characterized as having undergone a period of gestation.

Trial procedure, *circa* fifteen hundreds, did not demand that a witness be called before a jury to testify to his knowledge. Contrary to modern procedure, the accepted practice allowed jury members to obtain information, upon their own volition, from persons not called into court.[5] During this period, however, doubt began to permeate as to the trustworthiness of extra-judicial assertions alone, or in corroboration of other in-court testimony.[6] As aptly described:

> There had hitherto been no prejudice against the jury's utilizing information from persons not produced. But now that their verdict depended so much on what was laid before them at the trial, and now that the sufficiency of this evidence, in quantity and quality began to be canvassed, it came to be asked whether a hearsay thus laid before them would suffice.[7] (author's emphasis)

It was not, however, until the post-Restoration period that this adverse feeling to extra-judicial assertions began to be applied positively and consistently in judicial proceed-

---

[4] 5 Wigmore, *Evidence*, §1364, p. 10

[5] *Ibid.* at page 11

[6] *Ibid.* at page 14; Wignore attributes this to : (1) a natural inquiry by jurors who were becoming dependent on in-court evidence; (2) an emerging concern with the quality and sufficiency of a witness' testimony.

[7] *Ibid.* at page 13

[8] Ibid, at page 16

ings.[8] Sometime between 1675 and 1690 the hearsay rule was crystallized into a modified form.[9] Hearsay evidence was yet admitted for the limited purpose of confirmation or corroboration of other testimony, but it was generally regarded as insufficient as a sole foundation for a conclusion and was therefore excluded.[10] By the mid-seventeen hundreds the hearsay rule had become firmly established and "henceforth the only question can be how far there are to be specific objections to it."[11]

Hearsay statements made under oath followed a similar path of development as that of the hearsay rule. By the mid-sixteen hundreds extra-judicial statements made under oath were excluded where the deponent could appear personally in court.[12] By 1696 the concept that a deponent must be subjected to cross-examination was considered settled law.[13]

It may therefore be asserted that the rational of the hearsay rule, evolving from this English development, is predicated upon a concept that precludes the use of testimonial assertions, offered to prove the truth of the matter therein, which afford no opportunity of analysis *vis a vis* cross-examination and confrontation.

In the United States the hearsay rule was given firm footing by the United States Supreme Court in the decision of *Mima Queen v. Hepburn*, 7 Cranch 295 (1813). The principal issue centered upon the use of hearsay evidence to establish the fact of petitioner's freedom. Chief Justice

---

[9] McCormick, *Handbook of the Law of Evidence*, §223, p. 456. cf. 5 Wigmore, *Evidence*, §1364, p. 16.

[10] *Ibid.*

[11] *Op. Cit.* 5 Wigmore, *Evidence*, §1364, p. 18.

[12] *Ibid.* at page 21

[13] *Ibid.* at pages 24-25

Marshall, reasoning for the Court, established the following rule:

> [h]earsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. *Mima Queen v. Hepburn, supra.* at 295.

The rationale emanating from the reasoning of the Chief Justice is clearly indicative that the rule as established was not to be circumscribed in its application. *Mima Queen v. Hepburn, supra.* at 295. The Chief Justice also espoused words of warning to those who would create exceptions to the hearsay rule:

> [i]f other cases standing on similar principals should arise, it may well be doubted whether justice and general policy of law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule: the value of which is felt and acknowledged by all. *Mima Queen v. Hepburn, supra.* at 296; *See also Ellicott & Meredith v. Pearl,* 10 Peters 412 (1836).

With the advent of the administrative agency the application of the hearsay rule in relation thereto has assumed hybrid characteristics. Generally speaking the rules of evidence as applied in civil and criminal proceedings (and therefore the hearsay rule) are not equally applicable to administrative determinations. *Federal Trade Comm. v. Cement Institute,* 333 U.S. 683, 705, 706, (1948); *Opp Cotton Mills v. Administrator,* 312 U.S. 126, 155 (1941); *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 229, 230 (1938); *Falsone v. U.S.,* 205 F.2d 734 (5th Cir. 1953) *cert den.* 346 U.S. 864 (1953); 42 Am. Jur. 2d, *Administrative Law,* Sec. 382, p. 188. It may also be generally stated

that hearsay evidence is admissible in administrative proceedings. *Carter-Wallace, Inc. v. Gardner*, 417 F.2d 1086 (4th Cir. 1969); *Glaros v. Immigration and Naturalization Service*, 416 F.2d 441 (5th Cir. 1969); *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676 (9th Cir. 1949). This is true when no objection to its admission has been asserted, thereby allowing hearsay evidence to enter into the record as evidence of probative value, *U.S. v. Shaughnessy*, 116 F. Supp. 745 (D.C. S.D.N.Y. 1953); *Opp Cotton Mills v. Administrator, supra.*, or when the hearsay testimony is corroborated by other sufficient evidence, *Glaros v. Immigration and Naturalization Service, supra.* These hybrid precepts were not accomplished through the process of judicial development, but were mainly the products of congressional legislation. For example, the Administrative Procedure Act, 5 USCA §556 (d), and the Social Security Act, 42 USCA §4056, allow the admission of hearsay evidence over objection on the condition that such hearsay evidence be of probative value. *Willapoint Oysters, Inc. v. Ewing, supra.* What has been accomplished has been the substitution of the concept of probative value for the established safeguard of judicial admissibility. The primary reason for this seemingly backward step has been the avowed need for administrative expediency. However, even under the Administrative Procedure Act and the Social Security Act, all caution has not been cast to the wind. As was stated in the decision of *American University v. Prentiss*, 113 F.Supp. 389 (D.C. D.C. 1953), aff'd 214 F.2d 282, *cert. den., Wrather v. American University*, 348 U.S. 898 (1954):

> It is well established that administrative agencies are not required to apply the rules of law governing admissibility of evidence, these rules are binding only on judicial tribunals. Nevertheless, the probative weight of evidence is the same, irrespective of where

> the evidence is introduced, and must be tested by the same standards whether it is tendered to a court or to an administrative body. *American University v. Prentiss, supra.* at 393.

Mr. Justice Douglas, speaking for the majority, in the case of *Bridges v. Wixon*, 326 U.S. 135 (1945), stated:

> It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet as was aptly stated in *Interstate Commerce Commission v. Louisville & N.R. Co.*, 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431, "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted, or defended." *Bridges v. Wixon, supra. at* 154.

A similar concern with preserving essential rules of evidence in administrative proceedings was evident in the following language of the decision in *Dodsworth v. Celebrezze*, 349 F.2d 312 (5th Cir. 1965):

> As the fact findings of the adminstrator carry such awesome weight, it is essential that the proper legal standards be employed in the appraisal of the evidence. *Dodsworth v. Celebrezze, supra.* at 315.

The "awesome weight" to which the court referred has its expression in the "substantial evidence" rule. Under this concept the court is not allowed to substitute its judgment for that of the administrative agency, but only ascertain whether the decision was based on "substantial evidence." The difficulty of this task was expressed by the Senior Circuit Judge of the Sixth Circuit in the case of *Miracle v. Celebrezze*, 351 F.2d 361, (6th Cir. 1965):

> The review of cases for disability benefits under the Social Security Act is onerous from many aspects. The

case before the hearing examiner is heard informally. This means that there is practically no examination or cross-examination of any witnesses, except the claimant himself, usually a man whose life has been one of hard labor, and with little education; and, sometimes, a Vocational Counselor. The record, for the most part, consists of letters and written statements regarding the disability claimed, the extent of it, or the lack of it. Many of these statements consist of official printed forms of applications and reports filled in, in the handwriting of various individuals; and their reproduction in the record often requires laborious decipherment. *Miracle v. Celebrezze, supra.* at 382.

In the instant case, the court below was called upon to make the determination mentioned above. The court's decision was that uncorroborated hearsay in the circumstances of the present case was not "substantial evidence." This holding is certainly in accord with the authorities previously discussed. The abandonment of the lessons learned from centuries of experience does not commend itself to thinking men as indeed it did not commend itself to the court. Under the guise of the "substantial evidence" rule petitioner would have this Court abandon the traditional concepts of the law of evidence.

Amicus Curiae for the Respondent has found no case in which a court has held that uncorroborated hearsay, admitted over timely objection and controverted by direct, competent evidence was "substantial evidence" sufficient to support an administrative determination of an individual's rights. Nor has the petitioner cited any case in support of their contention that this has been done. Thus the authorities previously discussed would seem to require affirmance of the decision below rather than a decision which would elevate hearsay to a level equal or greater than that of direct, competent testimony.

Prior authorities notwithstanding, the petitioner has urged this Court to reverse the decision of the Court below on the ground that the hearsay in question is of such high probative value as would constitute "substantial evidence." Thus, it is necessary to inquire into the nature of "substantial evidence."

POINT III

Uncorroborated, ex-parte statements introduced over proper and timely objection in an administrative hearing leading to the adjudication of substantial rights under the social security disability law cannot, by themselves, amount to substantial evidence sufficient to support a determination, when such uncorroborated, ex-parte statements have been contradicted by direct, competent testimony presented at such administrative hearing.

This court has defined "substantial evidence" in the following terms:

> (Substantial evidence) ... means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.... Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," ... It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *National Labor Relations Board v. Columbian E. & S. Co.*, 306 U.S. 292, 300 (1939).

See also Washington, Virginia & Maryland Coach Co. v. N.L.R.B., 301 U.S. 142 (1937); *Consolidated Edison Co. v.*

N.L.R.B., supra; Baltimore & Ohio R.R. Co. v. Groeger, 266 U.S. 521 (1925); *Gunning v. Cooley*, 281 U.S. 90 (1930). This definition of "substantial evidence" has been widely accepted and is generally applied when determinations of the Social Security Administration are reviewed by the courts. *See eg. Miracle v. Celebrezze, supra; Combs v. Gardner*, 382 F.2d 949, 956 (6th Cir. 1967); *Marion v. Gardner* 359 F.2d 175, 180 (8th Cir. 1966); *Hayes v. Gardner*, 376 F.2d 517, 520 (4th Cir. 1967); *Bridges v. Gardner*, 368 F.2d 86, 90 (5th Cir. 1966).

The question now presented for inquiry is whether uncorroborated, hearsay evidence, without more, can be considered "substantial evidence" and if so, when? As *Amicus Curiae* on behalf of Respondent has shown from the evolving development of the law of evidence, hearsay has traditionally been considered "... incompetent to establish any specific fact which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." *Mima Queen v. Hepburn, supra*, at 295. Certainly, even though hearsay has its proper place in an administrative setting, along traditional lines it should be regarded as "suspect" and of "less probative weight" where direct evidence is available. Petitioner seems to imply that Respondent's position is one of advocating a total exclusion of all hearsay. This *Amicus Curiae* believes nothing could be further from the truth. Respondent's position rather, appears to be that hearsay evidence is admissible and can be considered by the agency, but in the instance where such hearsay evidence is objected to and contradicted by direct, competent testimony, then, if the hearsay remains uncorroborated, it cannot be "substantial evidence." Petitioner's implication is to place uncorroborated, hearsay evidence on an equal footing with direct, competent testimony. The prac-

tical effect of such a contention is to do away with centuries of judicial development, and to emasculate the claimant's traditional protection against arbitrariness by giving the government *carte blanch* indiscriminate power.

Petitioner would have this Court believe that such a novel departure from tradition is warranted because "... the probative value and reliability of both hearsay and non-hearsay evidence varies widely."[14] What Petitioner fails to appreciate is the elementary principle that the distinguishing factor between hearsay and non-hearsay evidence is the fact that the latter can be subjected to the fundamental safeguard of cross-examination thereby affording a basis of analysis leading to the discovery of truth whereas the former cannot. It is the contention of Petitioner that "the inherent reliability and probative valve of written medical reports brings them squarely within the standards of substantiality articulated by this Court."[15] This *Amicus Curiae* believes that both experience and tradition show this statement to be naive and unorthodox. As Judge McAllister, citing *Scott v. Celebrezze,* 241 F. Supp. 733, 736 (D.C. S.D.N.Y. 1965), points out with regard to the deficiency of blindly relying on such reports:

> ...that in cases reported in volumes 227-236 of the Federal Supplement the Secretary's decision was upheld only 27 times, but reversed or remanded 47 times, and in this court, during the past five years, the Secretary's decision was upheld 5 times and reversed 12 times, which again shows how careful and searching must be the review. *Miracle v. Celebrezze, supra* at 383.

---

[14] Petitioner's brief at page 11.

[15] *Ibid.* at page 12.

Moreover, Petitioner's evaluation of the "inherent reliability" of the agency's medical reports is based upon the assumption that "the reports are prepared by independent consultants who have no motive to be anything but impartial."[16] As is aptly pointed out by Robert M. Viles in *The Social Security Administration Versus the Lawyers . . . and Poor People too:*[17]

> On the one hand, the state agency's examining physicians are encouraged or permitted to issue full detailed reports of the medical condition of the examinee, whom, however, they may only observe and test once. This constitutes a substantial limitation on obtaining an accurate evaluation, especially for certain injuries and diseases. Notwithstanding their competence and experience for assessing the medical basis for disability and the independence of their professional status, it can be presumed that the same kind of relationship may occasionally exist between themselves and the contracting agency that is found in other, similar human relationships, i.e., some disposition to respond to the preferences of the employer.[18]

The courts have also recognized the intrinsic weakness of unsworn, uncorroborated, hearsay medical reports. In the case of *Colwell v. Gardner*, 386 F.2d 56 (6th Cir. 1967), the hearing examiner, disregarding the direct, competent testimony of two doctors who had treated the claimant, and relying solely on the uncorroborated, medical reports of the agency's examining doctor, denied claimant his disability benefits. With respect to the credibility of the hearsay medical reports, the court said:

---

[16] *Ibid.*

[17] *The Social Security Administration Versus the Lawyers . . . and Poor People Too*, 39 Miss. L. J. 371 (Part I) and 40 Miss. L. J. 24 (Part II): Mr. Viles has written a detailed treatise on Social Security Administration and its contemporary application.

> The Hearing Examiner, if he considered any medical evidence as bearing upon disability, which is doubtful — apparently relied upon the evidence of Dr. W. K. Massie, an orthopedic surgeon. Dr. Massie was employed by the Social Security Administration, and was solicited by it to give his views as to appellant's disability. The foregoing is no reflection upon Dr. Massie but, ... together with other factors, goes to the weight to be given his statement, under the circumstances of this case. *Colwell v. Gardner, supra* at 64.

As has been previously pointed out the awesome weight of the hearing examiner's decision demands that his appraisal of the evidence be governed by the proper legal standards. *Dodsworth v. Celebrezze, supra.*

Amicus Curiae on behalf of Respondent contends that the **inherent unreliability** of uncorroborated, hearsay evidence is precisely why it and it alone can not attain the "standards of substantiality" referred to by Petitioner on page 12 of his brief. This *Amicus Curiae* supports the well established principle that uncorroborated, hearsay evidence, without more, can not be "substantial evidence." *Consolidated Edison Co. v. N.L.R.B., supra; Aaron v. Fleming,* 168 F. Supp. 291 (D.C. Ala. 1959) ; *Mullen v. Gardner,* 256 F. Supp. 588 (D.C. E.D.N.Y. 1966) ; *Willapoint Oysters v. Ewing, supra; Bridges v. Wixon, supra; U.S. ex rel. Don Wing Ott v. Shaughnessy, supra; N.L.R.B. v. Amalgamated Meat Cutters,* 202 F. 2d 671 (9th Cir. 1953) ; *United States v. Krumsiek,* 111 F. 2d 74 (1st Cir. 1940). It is ironic that in this case Petitioner argues for the substantiality of uncorroborated, hearsay evidence. He would have this Court formulate a novel rule which places uncorroborated, hearsay on par with direct, competent testimony which very

---

[18] *Ibid.* 40 Miss. L. J. 24, 31-32.

well might destroy claimant's safeguard of cross-examination. However in the case of *Druminski v. Ribicoff*, 194 F. Supp. 798 (D.C. Alaska 1961), where the shoe was on the other foot, and it was claimant who had the hearsay medical statements on his side, the government exercised their right to cross-examine claimant's doctor. This case is illustrative of the fact that the government also follows the rule of direct testimony over hearsay when it is to their advantage. This case also points out the inherent shortcomings of written reports and how direct confrontation through cross-examination is much more apt to discover truth. If this is true for the government why not for claimant as well?

Amicus Curiae on behalf Respondent heartedly agrees with the court below in that uncorroborated, hearsay evidence, without more, cannot be "substantial evidence" and must yield to the more credible direct, competent testimony. Anything contrary would cast out centuries of judicial wisdom and propriety and would be a serious affront to the rights and safeguards of great numbers of individuals who are affected by administrative agencies.

Petitioner, in his brief on page 36, concedes that if uncorroborated hearsay, timely objected to and contradicted by direct, expert testimony cannot be "substantial evidence," then "... *(they)* might agree ... that the medical advisor's testimony, which is based on the medical evidence in the case, **could not furnish such corroboration.**" (emphasis added) This concession is well taken. As the court below reasoned:

> The testimony of the "expert" Dr. Leavitt, cannot serve to corroborate the hearsay reports of the absent doctors. His testimony was correctly described by the trial court as "hearsay on hearsay." Multiple hearsay

> is no more competent than single hearsay. *Cohen v. Perales*, 412 F.2d 44, 53 (5th Cir. 1969).

This treatment of the nature and weight of the testimony of Social Security's "circuit riding" non-examining "experts" is certainly not novel. Rather the courts generally recognize this principle as illustrated by the Court of Appeals, Fourth Circuit:

> We reach the conclusion that, in view of the opinion evidence as to the existence of a disability, combined with the overwhelming medical facts, the uncontradicted subjective evidence, and claimant's vocational background, the opinion of a doctor who never examined or treated the claimant cannot serve as substantial evidence to support the Secretary's findings. *Hayes v. Gardner, supra*, at 520-21.

In the case of *Mefford v. Gardner*, 383 F. 2d 748 (6th Cir. 1967), the court had another occasion to review a determination of the Secretary based on the opinion of a non-examining medical expert. The court said:

> But the remarkable value attached to Dr. London's statement by the Hearing Examiner is the surprising fact that, although the Hearing Examiner relied largely upon this statement, it appears that Dr. London had never examined, or had even seen, the appellee at any time. What could be the explanation for any weight given to such evidence? The opinion of the Hearing Examiner supplies the answer. He states:
>
> ..."Nevertheless, the Examiner believes that the opinions of medical authorities, though they have not examined an individual, are exceedingly helpful, particularly where there is apparent conflict in the medical evidence."
>
> Such a statement cannot be considered substantial evidence in view of the fact that he never saw or exam-

ined appellee, and in face of the medical evidence of physicians who not only treated him over a long period of time but also examined him and came to the determination that he was totally and permanently disabled. (emphasis by the court) 383 F.2d 748, 759.

On the basis of the foregoing authorities it may truly be said that such testimony by non-examining physicians constitutes pyramiding "hearsay on hearsay."

Nor is there substance to the Petitioner's contention that the court below applied the so-called "residuum rule" in reaching its decision, and in so doing, erred. Their argument, asserts that the residuum rule prevents the agency from giving "legally incompetent" evidence its "natural probative effect." (Brief of the Petitioner, page 30). The strongest reason against such a rule, petitioner argues, is the lack of correlation between reliability of evidence and the exclusionary rules of evidence. Undoubtedly there is some truth to this statement, as a general proposition. However, as has been previously discussed, hearsay has been traditionally excluded for the very reason that it lacks reliability. How can it be said, then, that there is no correlation between the reliability of hearsay and the rules which exclude it? Indeed, recogniziing the correlation between exclusion and reliability, the courts have formulated numerous exceptions to the hearsay rule to allow it in those circumstances when it is likely to be reliable and when better evidence is not readily available.

Further, the very authorities which Petitioner quotes in support of his argument are themselves zealous advocates of the right of confrontation and cross-examination as tools of seeking truth.

But regardless of the merits of the residuum rule, a correct analysis of the opinion of the court below reveals

that the rule was not applied by that court. A careful reading of the court's second opinion shows that their decision did not rest on the fact that no residuum of legally competent evidence was found in support of the agency's determination. The court held only that the agency's decision was not supported by substantial evidence when hearsay was not supported by competent evidence, was considered over timely objection, and was controverted by direct, competent testimony. The petitioner has interpreted the court's decision as a "blanket rejection" of administrative reliance on anything that can technically be deemed "uncorroborated hearsay." (Brief for the Petitioner, p. 29). The Court's opinion, especially the second opinion, simply does not hold this. Indeed, the Petitioner has cited numerous cases in which the courts have upheld determinations of the Secretary in which the only supporting evidence was written reports. (Brief for the Petitioner, p. 24). Likewise, the court below held only that uncorroborated hearsay was not substantial evidence in the limited circumstances outlined above. Further, even in these limited circumstances, the Secretary is not bound to rely on the claimant's legal evidence. If he is dissatisfied with such evidence, he is free to subpoena the government's reporting physicians and further develop the evidence in the case. This does not seem at all unreasonable, for surely our concept of due process entitles the claimant to at least this much. The inherent fairness of the decision under review is thus clearly seen — and the Secretary's only real complaint is that he has been burdened and inconvenienced. This *Amicus Curiae* believes that the Secretary's additional inconvenience of seeking corroboration of written medical reports, by the live testimony of reporting doctors in the few instances where this will be necessary will not "disrupt the administration of the program." Such a minor inconvenience is

but a small price to pay for the preservation of the cherished safeguards of confrontation and cross-examination.

CONCLUSION

The decision of the United States Court of Appeals, Fifth Circuit, holding that mere uncorroborated hearsay evidence, standing alone and without more, is not substantial evidence that will support a decision of the examiner adverse to the claimant, if the claimant objects to the hearsay evidence and if the hearsay evidence is directly contradicted by the testimony of live medical witnesses, should be affirmed.

Respectfully submitted,

FRANK P. CHRISTIAN

HARRY B. ADAMS, III

FRED J. DEYESO

MELVIN N. EICHELBAUM

203 West Nueva Street
San Antonio, Texas 78207

Attorneys for the Bexar County Legal Aid Association

APPENDIX

Petitioner's written consent for the Bexar County Legal Aid Association's filing of an *Amicus Curiae* brief on behalf of respondent.

Office of the Solicitor General
Washington, D. C. 20530
July 14, 1970

AIR MAIL

Frank P. Christian, Esq.
Bexar County Legal Aid Association
203 West Neuva Street
San Antonio, Texas 78207

Re: Finch v. Perales, No. 108,
October Term, 1970
(No. 1302, October Term, 1969)

Dear Mr. Christian,

On behalf of the petitioner in this case, I consent to the filing of a brief amicus curiae by the Bexar County Legal Aid Association.

Very truly yours,

Erwin N. Griswold
Solicitor General

Respondent's written consent for the Bexar County Legal Aid Association's filing of an amicus curiae brief on behalf of respondent

Law Offices of
TINSMAN & CUNNINGHAM INC.
1907 National Bank of Commerce Building
San Antonio, Texas 78205
Area Code 512 225-3125

Richard Tinsman
James D. Cunningham
Michael B. Hunter
Robert D. Sohn
John F. Younger, Jr.

July 8, 1970

Mr. Frank P. Christian
Attorney at Law
Bexar County Legal Aid Association
203 West Nueva Street
San Antonio, Texas 78207

Re: No. 1302 in the Supreme Court of
the United States
Secretary of Health, Education and Welfare
v.
Pedro Perales
Our File No. 367-A

Dear Mr. Christian:

I have received your letter of July 7, 1970, requesting permission for Bexar County Legal Aid Association to file a

brief as amicus curiae in the above matter.
As counsel of record for Pedro Perales you have my written consent evidenced by this letter to file your amicus curiae brief.

Very truly yours,

TINSMAN & CUNNINGHAM, INC.

Richard Tinsman

RT:af